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No. 00-1406

IN THE

Supreme Court of the United States

CHEVRON U.S.A., INC.,

Petitioner,

v.

MARIO ECHAZABAL,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE AMERICAN ASSOCIATION OF PEOPLE WITH DISABILITIES *ET AL.* AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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BRIEF FOR THE AMERICAN ASSOCIATION OF PEOPLE WITH DISABILITIES *ET AL.* AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT[1]

INTEREST OF THE *AMICI CURIAE*

This brief is filed on behalf of the American Association of People with Disabilities ("AAPD"), AARP, the American Council of the Blind ("ACB"), the American Diabetes Association ("ADA"), ADAPT, the Brain Injury Association of America, the Disability Rights Education and Defense Fund, ("DREDF"), Epilepsy Foundation®, HalftthePlanet Foundation, the Judge David L. Bazelon Center for Mental Health Law, the Legal Aid Society–Employment Law Center ("LAS-ELC"), the National Alliance for the Mentally Ill ("NAMI"), the

[1] No counsel for any party had any role in authoring this brief, and no persons other than the *amici curiae* and their counsel made any monetary contribution to its preparation or submission. Written consents from the parties to the filing of all *amicus* briefs are on file with the Clerk of the Court.

National Association of the Deaf Law Center, the National Association of Developmental Disabilities Councils ("NADDC"), the National Association of Protection and Advocacy Systems ("NAPAS"), the National Association of Rights Protection and Advocacy ("NARPA"), the National Council on Independent Living ("NCIL"), the National Mental Health Association, the National Mental Health Consumers' Self-Help Clearinghouse, the Polio Society, The Arc of the United States ("The Arc"), and the United Cerebral Palsy Associations, Inc. ("UCP"). These organizations have worked for years on behalf of persons with disabilities and have brought, supported, or participated in numerous lawsuits on behalf of such persons. They all have strong institutional interests in the correct interpretation of the Americans with Disabilities Act ("ADA") and in vindicating the principles of equality and fair opportunity embodied in that Act. Their interests are described in more detail in the Appendix to this brief.

With particular reference to this case, the *amici* organizations are intimately familiar with the role that paternalism has played in the lives of people with disabilities. For too long people with disabilities were considered incompetent to direct their own lives. The hallmark of the ADA is the recognition that people with disabilities can live independent lives. Key to this principle is the right to make decisions about risks that are worth taking. That is why the ADA does not allow employers to decide which jobs are too risky for people with disabilities. If Chevron's protectionist arguments were to prevail here, they could also be raised in other contexts to limit the ability of people with disabilities to be full, participating members of their communities, contrary to the primary goal of the ADA.

INTRODUCTION

This case presents the question whether Title I of the Americans with Disabilities Act of 1990, 42 U.S.C. ch. 126, subch. I, §§ 12101–12117, permits an employer to defend the refusal to hire or retain an employee who is a person with a "disability" (as defined in the Act) by proving that the conditions of employment pose a "direct threat" to the health or safety of that person. One of the provisions that addresses employers' defenses expressly states that "[t]he term 'qualification standards' may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace," Section 103(b) of the ADA, 42 U.S.C. § 12113(b), and that provision conspicuously fails to mention direct threats to the health or safety of the individual employee. The EEOC regulation at issue in this case, however, provides that "[t]he term 'qualification standard may include a requirement that an individual shall not pose a direct threat to the health or safety *of the individual* or others in the workplace." 29 C.F.R. § 1630.15(b)(2) (emphasis added).

Amici are concerned at the prospect of employers terminating and declining to hire otherwise qualified persons with disabilities on the ground that the job may pose a "direct threat" to the health or safety, not of other employees, customers, or others in or around the workplace, but of the individual himself or herself. The danger is not simply that employers will use safety as a cover for unwillingness to employ persons with disabilities based on prejudice (although that danger exists). Employers may also, in an excess of concern for the individual, exclude the person "for his or her own good," when the individual has a very different understanding and view about what is best for himself or herself. In addition, employers may conclude that employing a particular individual with a particular kind of disability—regardless of his or her knowledge, skills, experiences, and abilities—will add to their costs, whether in terms of

anticipated impact on employee morale, efficiency, increased workers' compensation insurance payments, or other costs, and want to exclude the individual from the job for that reason. These assessments will often be unsound, if only because of the uncertainties of prediction. Even if based on acceptable evidence, however, these judgments may unfairly and inappropriately exclude individuals from jobs they are fully capable of performing.

In *amici*'s view, the ADA addresses these dangers and imposes significant restraints on the extent to which employers may exclude employees or potential employees with disabilities for such health or safety reasons. As recognized through the legislative history, the ADA marked a major shift in public policy relating to disability, from dependence to independence, from social welfare to civil rights.[2] Essential to this shift is the concept of self-determination.[3] As people with disabilities know all too well, the "road to discrimination is paved with good intentions."[4] *Amici* agree that employers have a legitimate interest in worker health and safety issues. But the overarching purpose of the ADA is to ensure that individuals with disabilities who *can* work are not inappropriately or unnecessarily kept out of the workplace—both for their own benefit and for the benefit of society. Permitting employers to exclude them unnecessarily whenever there is a concern about

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[2] See H.R. Rep. No. 101-485, pt. 3 at 25–26 (1990). "Federal disability programs reflect an overemphasis on income support and an underemphasis on initiatives for equal opportunity, independence, prevention and self-sufficiency." 135 Cong. Rec. S10793 (Sept. 7, 1989) (statement of Sen. Biden).

[3] "Living independently and with dignity means opportunity to participate fully in every activity of daily life * * *. The ADA offers such opportunity to persons with disabilities." 136 Cong. Rec. S9695 (daily ed. July 13, 1990) (statement of Sen. Dole).

[4] 135 Cong. Rec. S10717 (daily ed. Sept. 7, 1989) (statement of Sen. Kennedy).

endangering their health deprives them of the dignity of making rational choices concerning their own lives, deprives society of their productive labor, and shifts to taxpayers, charities, or family members the costs of providing for them.

SUMMARY OF ARGUMENT

Amici support the arguments in the Brief for Respondent and will not repeat those arguments. This brief addresses three issues raised by the case or by *amici* supporting Chevron that are of general importance to the disability community.

First, an individual may be a "qualified individual with a disability"—and therefore entitled to ADA protection from discrimination—even if performing the job in question would pose a direct threat to his or her health or safety. An individual is a "qualified individual with a disability" under the ADA if he or she "can perform the essential functions of the employment position" in question. Section 101(8) of the ADA, 42 U.S.C. § 12111(8). Under the relevant EEOC regulations, a job "function" is a performance-related task that employees are required to perform. See, *e.g.*, 29 C.F.R. § 1630.2(n). An individual's ability to perform essential job functions without risk to his or her safety is neither a job function nor an otherwise required element of the term "qualified individual with a disability." Whether or not "threat to self" has a place elsewhere in the statute (and *amici* do not believe it does), it does not fit here.

Second, *amici* agree with Mr. Echazabal that "direct threat to self" is not a defense to liability under Section 103(a) of the ADA, 42 U.S.C. § 12113(a), and that Section 103(a) permits employers to exclude qualified individuals with disabilities from an employment position based on neutral qualification standards, only if they meet the stringent test of being job-related and consistent with business necessity. It is important to add, however, that an employer may exclude a qualified individual with a disability only if no "reasonable

accommodation" is available that may mitigate the impact of such neutral standards on the particular individual with a disability. Such accommodations are to be determined on a case-by-case basis, and may require an employer to *modify* a neutral qualification standard if such modification does not impose an "undue hardship" on the employer. This important protection for persons with disabilities should not be overlooked.

Third, *amici* urge this Court not to lower the standard for evaluating medical judgments concerning "threat to self" or concerning any medical judgments that may be relevant to the satisfaction of neutral qualification standards, as a group of *amici* in support of Chevron, consisting of three occupational medicine groups, propose. The occupational medicine groups argue that an "employer should not be required, on pain of being held liable for violating the ADA, to second-guess the facially reasonable opinions of competent physicians." Brief for *Amici* Am. Coll. of Occupational & Envtl. Med. *et al.* at 11. The "facially reasonable" standard that the occupational medicine groups propose does not adhere to rulings by both the EEOC and this Court that employers must rely on "objectively reasonable" medical evidence when they decide whether an individual is a "threat" for purposes of the ADA. 29 C.F.R. § 1630.2(r); *Bragdon* v. *Abbott*, 524 U.S. 624 (1998). Lowering the standard to "facially reasonable" judgments would frustrate the purposes of the ADA by giving the medical experts on whom employers rely virtually unreviewable discretion to exclude individuals with disabilities from the workforce. To the extent that the Court addresses the evidence required to establish "threat to self" at all, it should not set forth a lower standard than the "objectively reasonable" standard that both it and the EEOC have already adopted.

ARGUMENT

I. An Individual May be "Qualified" For a Job Even If Performing the Job Poses a Direct Threat to His or Her Health or Safety.

Under the ADA, an individual with a disability is a "qualified individual with a disability," and therefore entitled to protection from discrimination, if he or she "can perform the essential functions of the employment position that such individual holds or desires." Section 101(8), 42 U.S.C. § 12111(8). Chevron seeks to alter this standard, arguing that an individual is not a "qualified individual with a disability" if he or she "cannot perform the essential functions of a job without exacerbating a serious medical condition." Pet. Br. at 43. That added restriction—which conflates essential job functions with concerns about an individual's safety—is inconsistent with the ADA. It is not an essential job function to be able to perform the job without risk to one's own health or safety. Such concerns do not affect an individual's entitlement to ADA protection.

A. An Employee Is a "Qualified Individual With a Disability" If He or She Can Perform the Essential Functions of a Job, Even If that Performance Risks His or Her Health or Safety.

Chevron and several of its *amici* argue that a person is not a "qualified individual with a disability" under § 101(8) of the ADA, 42 U.S.C. § 12111(8), if employment at the job in question would pose a direct threat to that person's health or safety. *E.g.*, Pet. Br. at 42. That argument, if correct, would shift the burden of proof from the employer to the employee. That argument, however, is not correct. The ability to perform job functions without risk to one's health is not itself an essential job function and therefore does not affect a person's entitlement to ADA protection.

The plain text of the ADA directly supports this conclusion. Title I of the ADA prohibits employment discrimination against a "qualified individual with a disability," Section 102(a), 42 U.S.C. § 12112(a). Such an individual is defined as an individual "who, with or without reasonable accommodation, can perform the *essential functions* of the employment position that such individual holds or desires." Section 101(8), 42 U.S.C. § 12111(8) (emphasis added).[5] The Act does not provide that an individual with a disability is qualified only if he or she can perform essential job functions without risk to his or her health or safety.

The EEOC regulations concerning the ADA clarify the intended scope of essential job functions. The regulations state that the "essential functions" of a job are "the fundamental job duties of the employment position the individual with a disability holds or desires," rather than "the marginal functions of the position." 29 C.F.R. § 1630.2(n)(1). See also 29 C.F.R. pt. 1630 App. § 1630.2(n) ("essential functions are those functions that the individual who holds the position must be able to perform"); JA 209, 226 F.3d at 1071 ("Job functions are those acts or actions that constitute a part of the performance of the job."). Therefore, job "functions" are those "duties" that employees "must be able to perform." The EEOC regulations

[5] Notably, this standard is written in the present tense (*i.e.*, "can perform"), indicating that job qualifications are to be determined based on qualifications at the time of the employment decision, not qualifications after the individual has performed the job for some time. See 29 C.F.R. pt. 1630 App. § 1630.2(m) ("[t]he determination of whether an individual with a disability is qualified * * * should be based on the capabilities of the individual with a disability at the time of the employment decision, and should not be based on speculation that the employee may become unable in the future"); S. Rep. No. 101-116, at 26 (1989) ("The term 'qualified' refers to whether the individual is qualified at the time of the job action in question; the * * * possibility of future incapacity does not by itself render the person not qualified."); H.R. Rep. No. 101-485, pt. 2, at 55 (1990) (same).

add that "[a] job function may be considered essential for any of several reasons," including (i) that "the reason the position exists is to perform that function," (ii) "the limited number of employees available among whom the performance of that job function can be distributed," and (iii) that "[t]he function may be highly specialized." 29 C.F.R. § 1630.2(n)(2). Other evidence of which job functions are essential includes "[t]he amount of time spent on the job performing the function." *Id.* § 1630.2(n)(3). All of these regulations view job "functions" as the tasks required to perform a job, and none logically includes safety concerns as an independent job function. This conclusion is confirmed by the House and Senate reports concerning the ADA, which distinguish between safety concerns and job qualifications and state that it is "critical that paternalistic concerns for the disabled person's own safety not be used to disqualify an otherwise qualified applicant." S. Rep. No. 101-116, at 38 (1989); H.R. Rep. No. 101-485, pt. 2, at 72 (1990) (same).

Chevron argues that despite the EEOC regulations and legislative history, Mr. Echazabal is nonetheless not a "qualified individual with a disability" because working at the Chevron refinery risks harm to his health. Pet. Br. at 43. That distinction, which seeks to transform concerns for Mr. Echazabal's safety into a job qualification, is mere "word play." *International Union* v. *Johnson Controls, Inc.*, 499 U.S. 187, 207 (1991) ("'It is word play to say that "the job" at Johnson [Controls] is to make batteries without risk to fetuses in the same way "the job" at Western Air Lines is to fly planes without crashing.'") (quoting the court of appeals, which was referring to the facts of *Western Air Lines, Inc.* v. *Criswell*, 472 U.S. 400 (1985)) (citation omitted). The essential function of Mr. Echazabal's job in Chevron's coker unit was to "extract usable petroleum products from the crude oil that remains after other refining processes." JA 209, 226 F.3d at 1071. At no time was Mr. Echazabal unable to perform that function. See JA 211, 226 F.3d at 1072 (Chevron "has never contended that

the risk Echazabal allegedly poses to his own health renders him unable to perform [job] duties."). It would defy logic to argue that an individual cannot perform the essential functions of a job that he has satisfactorily performed for many years. Chevron's stated concern was for Mr. Echazabal's health, not his ability to perform the essential functions of the refinery job. Under the ADA, that concern is for Mr. Echazabal—and not his employer—to evaluate.[6]

Chevron's resort to dictionary definitions is therefore irrelevant, given that the ADA defines the relevant term—"qualified individual with a disability"—for purposes of the Act. Moreover, Chevron's first definition of "qualified," meaning "'fitted' by 'endowments * * * for a given purpose,'" Pet. Br. at 44 (citation omitted), does not render "safety to self in the performance of a job" into a job *function*. Mr. Echazabal was "fitted" for employment with Chevron because, given his lengthy service in the coker unit, he had demonstrated that he had the necessary "endowments" to do that job. See Brief for the United States and the EEOC as *Amici Curiae* at 24–25.

Chevron's second dictionary definition—which defines "qualified" as "'having complied with the specific requirements [for] employment'"—is similarly inapposite. Pet. Br. at 45 (citation omitted). Chevron argues that an employer may choose to require safety to self as a job qualification, and that "[t]here is no sign that Congress meant to preclude an employer from stipulating that an element of each essential function of a position is the ability to perform it safely." *Id.* In fact, the ADA does not permit employers to "stipulat[e]" which job functions are essential, but merely permits "consideration" of an employer's view thereof. Section 101(8), 42 U.S.C.

[6] See S. Rep. No. 101-116, at 28 (1989) ("[I]t would be a violation of this legislation if an employer were to limit the duties of an individual with a disability based on a presumption of what was best for such individual."); H.R. Rep. No. 101-485, pt. 2, at 58 (1990) (same).

§ 12111(8). To allow an employer's *preference* for job performance that does not pose a safety risk to the employee to determine which job functions are *essential* would render meaningless the requirement that employers only be permitted to require that individuals with disabilities be able to perform "essential" job functions. See JA 209, 226 F.3d at 1071 ("[A]n employer may not turn every condition of employment which it elects to adopt into a job function * * * merely by including it in a job description.").

The cases cited by Chevron do not rebut this conclusion. For example, Chevron relies upon *Koshinski* v. *Decatur Foundry, Inc.*, 177 F.3d 599 (7th Cir. 1999). Pet. Br. at 46. But in *Koshinski* the plaintiff admitted that, at the time of the employment decision, he "could no longer operate the cupola" (a blast furnace), which his job required. 177 F.3d at 602–03. That holding is not relevant where, as here, the individual with a disability is physically capable of performing the essential functions of the job in question.[7] Similarly, in *EEOC* v. *Amego, Inc.*, 110 F.3d 135 (1st Cir. 1997), which involved a suicidal individual who suffered from depression and whose job required her to administer medication to patients, the court found that the individual's disability prevented her from "perform[ing] an essential function" of her job—"overseeing and administering medication"—and that "[w]here those essential job functions necessarily implicate the safety of others, plaintiff must demonstrate that she can perform those functions in a way that does not endanger others." *Id.* at 144. That decision is inapplicable where, as here, the employee can perform all of the tasks that the job requires, and where such performance is not alleged to affect the safety of others. See

[7] The court in *Koshinski* indicated that it might have reached a contrary result under these circumstances, as, for example, "[i]t would be hard to imagine * * * that a court would sanction an employer's decision to fire a qualified employee simply because his degenerative heart disease makes a future heart attack inevitable." *Id.* at 603.

also, *e.g.*, *Turco* v. *Hoechst Celanese Corp.*, 101 F.3d 1090, 1093–94 (5th Cir. 1996) (worker with diabetes employed in position requiring "walking," "climbing," and "good concentration" not qualified because he could "hardly walk," "couldn't climb," and "lost his concentration").

Therefore, under the ADA an individual may be a "qualified individual with a disability" regardless of whether he or she can perform the job in question without posing a risk to his or her own safety.

B. In Section 101(8) of the ADA, Congress Declined to Follow the Rehabilitation Act Regulations That Included "Health" of the Individual in the Definition of an "Otherwise Qualified Individual with a Disability."

Chevron argues that the ADA definition of a "qualified individual with a disability" must parallel the definition of an "otherwise qualified individual with a disability" under Section 504 the Rehabilitation Act, 29 U.S.C. § 794. Pet. Br. at 47. Chevron further argues that because regulations interpreting the Rehabilitation Act state that an individual is not qualified if he or she cannot "perform the essential functions of the position in question without endangering the health and safety of the individual or others," 29 C.F.R. § 1614.203(a)(6), such a safety requirement should also be imposed on individuals claiming ADA protection. Pet. Br. at 47. That argument is not supported by the text of the ADA or by the applicable EEOC regulations, which were drafted *after* the Rehabilitation Act regulation in question but do not define "qualified individual with a disability" to include health or safety considerations.

As discussed above, under the ADA a "qualified individual with a disability" is "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such

individual holds or desires." Section 101(8), 42 U.S.C. § 12111(8). That definition conspicuously fails to mention the additional requirement in the Rehabilitation Act regulation that an individual with a disability be able to perform essential job functions "without endangering the health and safety of the individual or others." Despite Chevron's assertion that the Rehabilitation Act regulation should control the interpretation of the plain text of the ADA, the Rehabilitation Act regulation and the ADA definition materially differ on this issue. The ADA's statutory definition—drafted with full knowledge of the Rehabilitation Act regulation—obviously controls over the different definition in the Rehabilitation Act regulation. See JA 211, 226 F.3d at 1072 n.10 ("the ADA's statutory definition * * * supercedes the Rehabilitation Act's definition of the analogous term").

That the ADA generally incorporates the protections of the Rehabilitation Act does not alter this conclusion. Section 501(a) of the ADA provides that the ADA should not be interpreted to provide *less* protection than the Rehabilitation Act provides. See 42 U.S.C. § 12201(a) ("[N]othing in this chapter shall be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act * * * or the regulations issued by Federal agencies pursuant to such title."). The ADA does not require, nor would it make any sense to require, that if a person is *not protected* under the Rehabilitation Act then he or she is also not entitled to protection under the ADA.[8] Therefore the Rehabilitation Act regulations do not inject safety considerations into the ADA's

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[8] *Amici* Chamber of Commerce of the United States *et al.* make this same error and thus misstate the relationship between the ADA and the Rehabilitation Act. For example, they argue (at 11) that the "1992 Amendments to the Rehabilitation Act" state that "the standards under [the Rehabilitation Act and the ADA] are the same." In fact, that amendment provided that the Rehabilitation Act would employ the standards of the ADA, not vice versa. See 29 U.S.C. §§ 791(g), 794(d).

definition of "qualified individual with a disability," which, by its terms does not include such a requirement.

II. A Neutral Qualification Standard That Is Job-Related and Consistent With Business Necessity May Provide a Defense to Liability Under the ADA Only If No Reasonable Accommodation is Available.

We agree with and support Respondent's interpretation of § 103(a) of the ADA, 42 U.S.C. § 12113(a).[9] An employer cannot exclude a qualified individual with a disability simply because it can demonstrate that the conditions of employment pose a "direct threat" to the health or safety of the individual. Instead, the employer must rely on a neutral qualification standard or selection criterion that "has been shown to be job-related and consistent with business necessity" within the meaning of Section 103(a). That is a stringent requirement. "Selection criteria that * * * do not concern an essential function of the job would not be consistent with business necessity." 29 C.F.R. pt. 1630, App. § 1630.10 (2d ¶). The requirement does not permit an employer to justify an allegedly neutral qualification by reference to alleged impact on employee morale, business reputation, added efficiency, or extra cost, unless those can be directly tied to an essential function of the specific job in question.[10]

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[9] That subsection provides: "It may be a defense to a charge of discrimination under this chapter [of 42 U.S.C.] that an alleged application of qualification standards * * * that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation, as required under this subchapter [of 42 U.S.C. ch. 126]."

[10] In connection with alleged efficiency concerns, the ADA's legislative history shows that Congress had evidence that workers with disabilities did not damage employer efficiency. A comprehensive study concerning physically impaired employees of E.I. DuPont de Nemours and Company, discussed at S. Rep. No. 101-116, at 28–29 (1989), concluded that "Du Pont has had no increase in [insurance] compensation costs as a result of hiring the handicapped and no lost-time injuries of the handicapped have been experienced." *Id.* at 29. With respect to other concerns, "the study showed that the disabled worker performed as well as or better than their non-disabled co-workers," and "[t]he fears of safety and absenteeism were unfounded." *Id.* Specifically, for example, "[o]nly four percent of the workers with disabilities were below average in safety records; more than half were above average," and that "[n]inety-three percent of the workers with disabilities rated average or better with regard to job stability (turnover rate)." *Id.*

We add, however, that to focus only on the job-related/business-necessity requirement of Section 103(a) ignores one of its basic additional requirements: that the ADA's defense for neutral "qualification standards, tests, or selection criteria" that are "job-related and consistent with business necessity" must be viewed in light of any available "reasonable accommodation" that may mitigate the exclusionary impact of such qualification standards. 42 U.S.C. § 12113(a). The applicability of a facially neutral qualification standard is no defense to liability under the ADA if a reasonable accommodation would mitigate the impact of the selection criteria on a particular individual with a disability.

The facts of each case determine whether a particular accommodation is reasonable for a particular individual with a disability at a particular job. See 29 C.F.R. § 1630.2(o)(3) ("To determine the appropriate reasonable accommodation it may be necessary for the covered entity to initiate an informal, interactive process with the qualified individual with a disability in need of the accommodation."); S. Rep. No. 101-116, at 31 (1989) ("The decision as to what reasonable accommodation is appropriate is one which must be determined based on the particular facts of the individual case."); H.R. Rep. No. 101-485, pt. 2, at 62 (1990) (same). An accommodation is not reasonable if, under the circumstances, it would impose an "undue hardship" on the employer, Section 102(b)(5)(A), 42 U.S.C. § 12112(b)(5)(A), under the definition and the factors

specified in Section 101(10), 42 U.S.C. 12111(10). The determination of "undue hardship" itself requires an individualized inquiry. See H.R. Rep. No. 101-485, pt. 2, at 70 (1990) ("the ultimate determination" of what constitutes undue hardship "is a factual one which must be made on a case-by-case basis").

It is clear, moreover, that a reasonable accommodation may in some cases include requiring an employer to adopt alternative qualification standards or selection criteria to minimize the impact of the neutral qualification standards on the individual with a disability. See S. Rep. No. 101-116, at 38 (1989) (Even neutral selection criteria "may not be used to exclude an applicant with a disability if the criteria can be satisfied by the applicant with a reasonable accommodation. A reasonable accommodation may entail adopting an alternative, less discriminatory criterion."); H.R. Rep. No. 101-485, pt. 2, at 70–71 (1990).[11] Therefore, where an individual with a disability can perform all essential job functions, but qualification standards serve to exclude that individual from an employment position, the ADA requires the employer to consider, in consultation with the individual, whether a reasonable accommodation in the form of an alternative qualification standard would assist the individual without imposing an undue hardship on the employer.[12] If the

[11] See also 29 C.F.R. § 1630.2(o)(1) ("*reasonable accommodation* means: (i) Modifications or adjustments to a job application process that enable a qualified applicant with a disability to be considered for the position such qualified applicant desires").

[12] Factors used to determine whether an accommodation poses an undue hardship to employers include (i) "the nature and cost of the accommodation"; (ii) "the overall financial resources of the facility" and "the impact otherwise of such accommodation upon the operation of the facility"; (iii) "the overall financial resources of the covered entity"; and (iv) "the type of operation or operations of the covered entity." Section 101(10)(B), 42 U.S.C. § 12111(10)(B).

qualification standard can be modified without causing such an "undue hardship" for the employer, the ADA requires the employer to make such an accommodation.

Chevron has defended the EEOC's direct-threat regulation as lawful under the job-related/business-necessity standard of Section 103(a), referring to a number of employer interests, including those of avoiding the "moral dilemma" of employing at-risk individuals, "lower employee morale," and "adverse publicity." Pet. Br. at 22–23. It is highly unlikely that an allegedly neutral qualification standard could be justified on as job-related and consistent with business necessity because of such employer concerns. Likewise, concerns about such matters should rarely, if ever, be relevant to proving "undue hardship" in response to a claim that a lawful qualification standard must be modified to provide a reasonable accommodation. Permitting such vague concerns in connection with "undue hardship" would vitiate the reasonable accommodation requirement and would permit mistaken beliefs about persons with disabilities among other employees or members of the public to veto a reasonable accommodation that the employer has no good reason to refuse. Congress could not have intended such a result.[13]

[13] Both the House and Senate reports concerning the ADA recognize the applicability of the reasonable accommodation requirement in this context. See H.R. Rep. No. 101-485, pt. 2, at 74 (1990); S. Rep. No. 101-116, at 27 (1989). Both reports cite *Strathie* v. *Department of Transportation*, 716 F.2d 227 (3d Cir. 1983), in which a school bus driver brought a Rehabilitation Act challenge against a state requirement that drivers be able to hear at certain levels without using a hearing aid. *Id.* at 228–29. A bus driver who used a hearing aid was excluded because of fear that the aid would become dislodged. The court held that the state must alter that qualification standard to accommodate individuals who wear hearing aids (*e.g.*, by requiring them to use a hearing aid that will not fall out) if the alteration would not impose an undue hardship on the state. While *Strathie* concerns the danger of a threat to others (such as students on the bus), its invocation of the reasonable accommodation requirement would be equally applicable

III. The Standard for the Medical Evidence on Which Employers Rely Should Not Be Lowered from the "Objectively Reasonable" Standard that the EEOC and this Court Have Already Adopted.

Amici support Respondent's position that "threat to self" is not a defense under the ADA. *Amici* address here an important issue concerning the standard under which medical judgments concerning "threat to self" would be evaluated and under which any medical judgments that may be relevant to the satisfaction of neutral qualification standards would in any event be addressed. Specifically, *amici* urge this Court not to accept an invitation, extended by a group of *amici* in support of Petitioner, to lower the standard for such evidence below the standard of "objective reasonableness" that both this Court and the EEOC have adopted.

A group of *amici* consisting of the American College of Occupational and Environmental Medicine, the Western Occupational and Environmental Medical Association, and the California Society of Industrial Medicine and Surgery (the "Occupational Medicine Groups") argue that the district court should defer to the medical evidence on which Chevron

in a case in which an employer claimed that it would be an undue hardship to modify a neutral qualification standard, by expressing concern about the health or safety of the individual.

relied.[14] Specifically, the Occupational Medicine Groups argue that:

> "[a]n employer should not be required, on pain of being held liable for violating the ADA, to second-guess the facially reasonable opinions of competent physicians or to conduct its own full trial of the relevant medical issues each time it is required to assess whether an employee is qualified or poses a 'direct threat.'" Brief for *Amici* Am. Coll. of Occupational & Envtl. Med. *et al.* at 11.

Under the Occupational Medicine Groups' standard, an employer's determination that an individual poses a threat to his or her own health would be unassailable as long as evidence from the employer's own medical expert was "facially reasonable." The employer's duty would be limited to ensuring—often with a medically-untrained eye—that nothing was apparently unreasonable with the expert opinions on which it relied. After fulfilling this duty, the employer could rely on its own experts' opinions—both in making the decision and in court—without regard to whether those opinions were objectively reasonable and supported by the most recent research and prevailing medical opinion.

That standard does not adhere to rulings by both the EEOC and this Court that employers must rely on "objectively reasonable" medical evidence when they decide whether an

[14] In its brief, Chevron describes its physicians' examinations and findings and states that "[i]n these circumstances Chevron was entitled to base its decision on the opinions of its doctors * * *." Pet. Br. at 41. Chevron does not set forth a standard for the medical evidence on which employers rely. To the extent that the "circumstances" in this case do not comport with the "objective reasonableness" standard, *amici* direct this argument to Chevron's argument that it was "entitled" to rely on its doctors' opinions.

individual constitutes a "threat" for the purposes of the ADA. In its Title I regulations, the EEOC provided that the "determination that an individual poses a 'direct threat' * * * shall be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence." 29 C.F.R. § 1630.2(r). Similarly, in *Bragdon* v. *Abbott*, 524 U.S. 624 (1998), this Court stated, in a related context, that determinations about whether an individual is a direct threat must be "based on the objective, scientific information available to [the medical expert] and others in his profession," and that courts should "assess the objective reasonableness" of medical determinations by determining whether they were "reasonable in light of the available medical evidence." 524 U.S. at 649–50. Although in *Bragdon* this Court interpreted the "direct threat" defense of Section 302(b)(3), 42 U.S.C. § 12182(b)(3),[15] the "objectively reasonable" standard—and certainly no lower standard—should apply to "threat to self" under Title I, if the Court concludes that Title I permits such a defense. That is true regardless of whether "threat to self" is treated as a defense pursuant to 29 C.F.R. §§ 1630.15(b)(2) and 1630.2(r) or, without regard to those regulations, pursuant to a neutral qualification standard under Section 103(a).

Under this standard, employers may rely only on objectively reasonable medical evidence. Contrary to the Occupational Medicine Groups' proposal, employers are not immune from challenge merely because they were not presented with any

[15] That subsection provides: "Nothing in this subchapter [of 42 U.S.C. ch. 126] shall require an entity to permit an individual to participate in or benefit from the goods, services, facilities, privileges, advantages and accommodations of such entity where such individual poses a direct threat to the health or safety of others. The term 'direct threat' means a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures or by the provision of auxiliary aids or services."

alternative opinions and because the opinions on which they relied appeared reasonable. The onus is on employers to ensure that the opinions on which they rely are "objectively reasonable." This does not mean that employers are faced with the impossible task of ensuring that those opinions are not subject to disagreement or debate, or that courts must engage in the business of deciding whether the employers' doctor reached the "correct" medical conclusion. It does mean, however, that employers must be able to demonstrate that the opinions and evidence on which they rely are supported by more than good faith, "facially reasonable" assessments. As the EEOC provided, such opinions and evidence must be based on "the most current knowledge and/or on the best available objective evidence." And plaintiffs must be able to introduce evidence in court addressing whether the medical evidence on which the employer relied was "objectively reasonable."

Adopting the Occupational Medicine Groups' proposed standard would frustrate the purposes of the ADA by giving the medical experts on whom employers rely virtually unreviewable discretion to exclude individuals with disabilities from the workforce. Under that standard, plaintiffs who did not present their employers with medical evidence at the time the employers made their determination would not be able to introduce that evidence in court to counter the opinions on which the employers relied. Employers, in turn, could exclude individuals with disabilities from the workforce without ensuring that their reasons for doing so were objectively reasonable. Congress demanded more of employers and gave greater rights to plaintiffs.

That later-acquired medical evidence be admitted into evidence is particularly important in the light of the practical difficulties that individuals with disabilities face in countering an employer's medical determination. Unrepresented individuals with disabilities—like most people—may be predisposed towards accepting a medical doctor's opinion, even

when that opinion comes from a doctor hired by an employer. Moreover, even if they are inclined to question the employer's medical opinion on the merits, they may be uninsured or underinsured and may otherwise lack the resources to obtain a medical opinion that would both contradict that of the doctor hired by the employer and be of such a nature as to raise a question about the objective reasonableness of the opinion of the employer's doctor. Under the Occupational Medicine Group's standard, such individuals would never be able to recover under the ADA, even if, by the time of a lawsuit, they had gathered evidence to attack the objective reasonableness of the decision by the employer's doctor. Such a harsh result could not have been intended by Congress.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the Court of Appeals.

Respectfully submitted,

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APPENDIX

The *Amici* Organizations

The American Association of People with Disabilities ("AAPD") is a non-profit membership organization of children and adults with disabilities, their family members, and their supporters. AAPD's mission is to promote political and economic empowerment for the more than 56 million Americans with disabilities. AAPD was founded on the fifth anniversary of the signing of the Americans with Disabilities Act (ADA). AAPD works to ensure effective enforcement and implementation of the ADA and other civil rights laws.

AARP is a nonprofit membership organization serving more than thirty-four million persons age 50 and older that is dedicated to addressing the needs and interests of older Americans. One of AARP's primary objectives is to strive to achieve dignity and equality in the workplace through positive attitudes, practices, and policies towards work and retirement. In pursuit of this objective, AARP has since 1985 filed more than 200 *amicus* briefs before this Court and the federal appellate and district courts. More than forty percent of AARP's members are employed, and many of those with disabilities rely on the American's with Disabilities Act to create a work place free from discrimination. The protections of the Americans with Disabilities Act are especially important to AARP members because older persons have a higher incidence of disabilities than other populations.

The American Council of the Blind ("ACB") is a leading national consumer organization of the blind, which strives to improve the quality of life, equality of opportunity, and independence of all persons who are blind. To that end, ACB seeks to educate policy-makers about the needs and capabilities of people who are blind, to assist individuals and organizations wishing to advocate for the needs of people who are blind, and to disseminate information to both the blind and sighted public.

ACB was at the forefront of the activity which led to the enactment of the ADA. Efforts to preserve the rights gained through that statute and to strengthen its protections for people who are blind continue through ACB's legislative and advocacy activities aimed at increasing the accessibility of employment, information, public transportation, and programs and services of state and local governments. As a result, ACB is deeply concerned that these rights may now be in jeopardy. Further, ACB is concerned that, if the ADA is weakened, there will be a return to previous patterns of consistent and pervasive discrimination against persons with disabilities, and particularly persons who are blind. Therefore, we believe that efforts to preserve and strengthen the ADA are of paramount importance.

The American Diabetes Association ("ADA") is the nation's leading nonprofit health organization providing diabetes research, information, and advocacy. The mission of the organization is to prevent and cure diabetes, and to improve the lives of all people affected by diabetes. As part of its mission, the ADA advocates for the rights of people with diabetes and supports strong public policies and laws to protect persons with diabetes against discrimination. The ADA has over 400,000 general members and over 17,000 professional members.

ADAPT is a national organization, most of whose members have severe disabilities and have been institutionalized in nursing facilities and other public institutions solely because they have disabilities. ADAPT has a long history and record of enforcing the civil rights of people with disabilities and was one of the key organizations that participated in the political and legislative process that resulted in the passage in 1990 of the ADA.

The Brain Injury Association of America is the only national nonprofit organization working on behalf of the more than 1.5 million Americans who sustain a brain injury each year and the estimated 5.3 million Americans who live with permanent disabilities resulting from a brain injury and their families.

With its network of more than 45 Chartered State Affiliates and hundreds of local chapters and support groups across the country, the Association's mission is to create a better future through brain injury prevention, research, education and advocacy.

The Disability Rights Education and Defense Fund, Inc., ("DREDF") based in Berkeley, California, is a national law and policy center dedicated to securing equal citizenship for Americans with disabilities. DREDF pursues its mission through education, advocacy and law reform efforts. In its efforts to promote to full integration of citizens with disabilities into the American mainstream, DREDF has represented or assisted hundreds of people with disabilities who have been denied their rights and excluded from opportunities because of false and demeaning stereotypes, and has fought to ensure that people with disabilities have the remedies necessary to vindicate their right to be free from discrimination. DREDF is nationally recognized for its expertise in the interpretation of disability civil rights laws.

Epilepsy Foundation® is the sole national voluntary health organization dedicated to advancing the interests of the more than 2.3 million Americans with epilepsy. Epilepsy is a chronic neurological condition manifested by recurring seizures. While medical and scientific advances have made it possible for many people with epilepsy to control, to varying degrees, their seizures, and participate in a wide variety of activities, many of these people are unable to obtain employment because of the stigma associated with the condition and misfounded fear that the individual will harm himself or others. For this reason, the Foundation has worked hard for the passage of laws like the Americans with Disabilities Act, and continues to advocate for their enforcement.

HalfthePlanet Foundation is a non-profit organization that offers comprehensive, reliable information, products, and services to people with disabilities, their families and friends.

The Foundation administers a well-known website—halftheplanet.com—the most comprehensive disability resource on the Web, created by people with disabilities for people whose lives are touched by disability. HalfthePlanet Foundation supports the application of technology to promote the values of the Americans with Disabilities Act—independent living, social inclusion, equality of opportunity, economic self-sufficiency, and empowerment.

The Judge David L. Bazelon Center for Mental Health Law is a national legal advocacy organization dedicated to advancing the rights and dignity of individuals with mental disabilities. The Center has litigated several cases involving employment of individuals with mental disabilities under the Americans with Disabilities Act and has an interest in ensuring that people with mental disabilities are able to continue to contribute to society and to maintain employment through changes in the work environment that allow them to successfully do their jobs.

The Legal Aid Society–Employment Law Center ("LAS-ELC") is a private, non-profit organization. The primary goal of the LAS-ELC is to improve the working lives of disadvantaged people. Since 1970, the Center has represented clients in cases covering a broad range of employment-related issues including discrimination on the basis of race, gender, age, disability, pregnancy and national origin. The Center's interest in the legal rights of those with disabilities is longstanding. The LAS-ELC has represented and continues to represent clients faced with discrimination on the basis on their disabilities, including those with claims brought under the Americans with Disabilities Act. The Center has also filed *amicus* briefs in cases of importance to disabled persons.

The National Alliance for the Mentally Ill ("NAMI"), with more than 200,000 members and 1200 state and local affiliates, is the nation's leading grassroots advocacy organization dedicated exclusively to improving the lives of persons with

severe mental illnesses, including schizophrenia, bipolar disorder (manic-depressive illness), major depression, obsessive-compulsive
disorder, and severe anxiety disorders.

The National Association of the Deaf, whose members are deaf and hard-of-hearing adults, parents of deaf and hard-of-hearing children, and professionals, works to safeguard the civil rights of deaf and hard-of-hearing Americans.

The National Association of Developmental Disabilities Councils ("NADDC") is a national, non-profit organization representing State Councils on Developmental Disabilities that work for change on behalf of people with developmental disabilities and their families. It promotes national policy to enhance the quality of life for all people with developmental disabilities, enabling them to exercise self-determination, be independent, productive, integrated and included in all facets of community life. NADDC is strongly committed to the proper interpretation and enforcement of the Americans with Disabilities Act.

The National Association of Protection and Advocacy Systems ("NAPAS"), which was founded in 1981, is the membership organization for the nationwide system of protection and advocacy (P&A) agencies. P&As are mandated under the Developmental Disabilities Assistance and Bill of Rights Act, 42 U.S.C. § 6000 *et seq.*, and the Protection and Advocacy for Individual Rights Program, 29 U.S.C. § 794e. The P&A system comprises the nation's largest provider of legally based advocacy services for persons with disabilities, using a variety of mechanisms including individual case representation, systemic advocacy, information and referral, and education and training. NAPAS facilitates the coordination of P&A activities, provides P&As with training and technical assistance, and represents their interests before the federal government. As such, it has a strong interest in ensuring that

employment options are not restricted for people with disabilities.

The National Association of Rights Protection and Advocacy ("NARPA") was formed in 1981 to provide support and education for advocates working in the mental health arena. It monitors developing trends in mental health law and identifies systemic issues and alternative strategies in mental health service delivery on a national scale. Members are attorneys, people with psychiatric histories, mental health professionals and administrators, academics, and non-legal advocates—with many people in roles that overlap. Central to NARPA's mission is the promotion of those policies and strategies that represent the preferred options of people who have been diagnosed with mental disabilities. Approximately 40 percent of NARPA's members are current or former patients of the mental health system. NARPA has submitted *amicus* briefs in many cases in federal and state courts in cases affecting the lives of persons with psychiatric disabilities, including *Olmstead* v. *L. C.*, 527 U.S. 581 (1999); *University of Alabama* v. *Garrett*, 531 U.S. 356 (2001); *Godinez* v. *Moran*, 509 U.S. 389 (1993); *Washington* v. *Harper*, 494 U.S. 210 (1990); *T.D.* v. *New York State Office of Mental Health*, 91 N.Y.2d 860, 668 N.Y.S.2d 153, 690 N.E.2d 1259 (1997); *Phoebe G.* v. *Solnit*, 252 Conn. 68, 743 A.2d 606 (1999). NARPA members were key advocates for the passage of Federal legislation such as the Americans with Disabilities Act and the Protection and Advocacy for Individuals with Mental Illness Act of 1986, 42 U.S.C. §§ 10801–51.

The National Council on Independent Living ("NCIL") is the oldest cross-disability, national grassroots organization run by and for people with disabilities. NCIL's membership is comprised of a nationwide network of centers for independent living, statewide independent living councils, people with disabilities, and other disability rights organizations. NCIL's mission is to advance the independent living philosophy and to

advocate for the human rights of, and services for, people with disabilities to further their full integration and participation in society.

Established in 1909, the National Mental Health Association, with its more than 340 affiliates, is dedicated to promoting mental health, preventing mental disorders, and achieving victory over mental illness through advocacy, education, research and services. NMHA envisions a just, humane and healthy society in which all people are accorded respect, dignity and the opportunity to achieve their full potential free from stigma and prejudice.

The National Mental Health Consumers' Self-Help Clearinghouse is a national technical assistance center established in 1986. It is run by and for people who are consumers of mental health services and survivors of psychiatric illness (known as consumers/survivors). Its mission is to promote consumer/survivor participation in planning, providing and evaluating mental health and community support services, to provide technical assistance and information to consumers/survivors interested in developing self-help services, and advocating to make traditional services more consumer/survivor-oriented. The Clearinghouse has an interest in helping people with mental illness live to their full potential as active members of the community.

The Polio Society serves its nationwide membership with information and referral services, training in self-advocacy to enforce the civil rights of persons with disabilities, and support for legislation of benefit to polio survivors and the disability community at large. The Americans with Disabilities Act is a key element of the Polio Society's advocacy. The members are persons with disabilities as a result of polio and post-polio syndrome ("P.P.S.").

The Arc of the United States ("The Arc"), through its nearly 1000 state and local chapters, is the largest national voluntary

organization in the United States devoted solely to the welfare of the more than seven million children and adults with mental retardation and their families. Since its inception, The Arc has vigorously challenged attitudes and public policy, based on false stereotypes, that have authorized or encouraged segregation of people with mental retardation in virtually all areas of life. The Arc was one of the leaders in framing and supporting passage of the Americans with Disabilities Act.

United Cerebral Palsy Associations, Inc., ("UCP") is a Washington, D.C.-based non-for-profit corporation incorporated in 1948. The mission of UCP is to advance the independence, productivity and full citizenship of people with cerebral palsy and other disabilities, through its commitment to the principles of independence, inclusion and self-determination. UCP is the leading source of information on cerebral palsy and is a pivotal advocate for the rights of all people with disabilities. UCP and its nationwide network of over 100 affiliates in 39 dates strive to ensure the inclusion of persons with disabilities in every facet of society—from the web to the workplace, from the classroom to the community. The UCP family serves 30,000 children and adults with disabilities a day, or over 1,000,000 each year.